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No. 93-1587

In the Supreme Court of the United States

OCTOBER TERM, 1993

ANN B. LOVELL, ET AL., PETITIONERS

v.

THE ONE BANCORP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether depositors in a state-chartered mutual savings institution hold a property interest, cognizable under the Due Process or Takings Clause, in the distribution of the institution's accumulated surplus upon conversion of the institution's ownership structure to a stock form.

2. Whether petitioners received constitutionally adequate notice of the conversion of the institution to stock form in this case.

3. Whether the conversion of the institution in this case was so arbitrary that it infringed petitioners' substantive due process rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported, but the judgment is noted at 14 F.3d 44 (Table). The opinion of the district court in the *The One Bancorp* case (Pet. App. 5a-34a) is reported at 818 F. Supp. 412. The opinion of the district court in the *Peoples Heritage Savings Bank* case (Pet. App. 35a-45a) is reported at 818 F. Supp. 427. A related opinion of the Supreme Judicial Court of Maine is reported at 614 A.2d 56.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. The petition for a writ of certiorari

was filed on April 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[1]

1. Maine Savings Bank was organized as a mutual financial institution pursuant to Maine statutes governing that type of institution. In December of 1983, the Bank filed an application with state regulators seeking to convert the institution to a form in which it would be owned by stockholders. The application indicated that the Bank would issue all of its stock to a newly formed entity named The One Bancorp (Bancorp), which would offer the stock for sale, first to account holders with balances exceeding $50.00 as of August 31, 1983, and then, to the extent not purchased by those account holders, to other account holders, employees, and finally the general public. The price of the stock would be its fair market value, as determined by an independent appraisal. Bancorp then would distribute to the Bank a portion of the proceeds sufficient to maintain the Bank's capital-to-asset ratio. See Pet. App. 7a-8a.

The plan did not provide for any distribution—of cash or otherwise—to the Bank's existing account holders. The plan did provide, however, for the creation of a special liquidation account that would set forth the priorities for the distribution of any net surplus of the Bank if the Bank should liquidate while

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[1] The petition seeks review of two separate cases, consolidated for disposition by the court of appeals in a single opinion. Because the FDIC is involved only in the case styled *The One Bancorp*, this brief does not address the *Peoples Heritage Savings Bank* case. The respondents in that case have filed a separate brief in opposition to the petition.

solvent within ten years after the conversion. The liquidation account was not a separate pool of funds, but only an accounting entry of a contingent liability against the Bank. Each eligible account holder's interest in the liquidation account would decline as withdrawals were made from his or her deposit account. The liquidation account would terminate ten years after the conversion. See Pet. App. 8a-9a.[2]

In January of 1984, the Maine Bureau of Banking (Banking Bureau) accepted the Bank's application and instructed the Bank to publish a specified notice of the application in various newspapers, indicating, among other things, that interested parties could submit comments on the application to the Banking Bureau and that a hearing would be held upon receipt of an appropriate request. No comments were submitted, and the Banking Bureau conditionally approved the application in April of 1984. The Bank then mailed to each account holder a notice of a

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[2] Applicable regulations of the Federal Home Loan Bank Board (FHLBB) governing the mutual-to-stock conversion of FHLBB-regulated savings and loan institutions and federally chartered mutual savings banks generally required the procedures set forth in the Bank's application, except for the provision limiting the liquidation account to a term of ten years. See Pet. App. 9a-10a. On May 31, 1994, the FDIC issued a Proposed Rule and a Notice and Request for Comments, both related to "Mutual-to-Stock Conversions of State Nonmember Savings Banks." [Those documents had not appeared in the *Federal Register* by the date this brief was printed.] Any rule that results from the FDIC's consideration, however, would not apply to this conversion, which occurred almost ten years ago. Moreover, no change in the administrative regulations governing such conversions would support the claims of constitutional entitlement raised by the petition.

special meeting of account holders to take place in May of 1984, at which account holders could vote for or against the planned conversion. The mailing included a summary description of the planned transaction, as well as a copy of the formal Plan of Conversion, and noted the provisions of Maine law providing that each account holder who did not vote against the plan at the meeting would be deemed to have voted in favor of the plan. At the meeting, 26 account holders in attendance voted for the plan, nine account holders voted against the plan, and two abstained from voting. The remaining 88,867 account holders, including petitioners, were deemed to have voted for the plan. Because a majority of the account holders voted in favor of the plan, the Superintendent of the Banking Bureau issued a Certificate of Conversion on June 7, 1984. The Banking Bureau's action was not challenged within the 40-day period available for judicial review under Maine law. See Pet. App. 10a-12a.

The subscription period for the shares ran from April 17 to May 17, 1984, and resulted in subscriptions for over 600,000 shares, approximately 17.4% of the 3.6 million shares available. Petitioners did not subscribe for shares, although 2,500 other account holders did. After the transaction was consummated, Bancorp sold the remaining 2,972,705 shares in a public offering. The combined gross proceeds from the subscription offering, the public offering, and purchases by the underwriters were about $48.1 million. After expenses and discounts, the net proceeds to Bancorp were about $43.7 million, of which $5.8 million was transferred to the Bank as additional capital. See Pet. App. 11a-13a.

2. Petitioners filed this suit in the United States District Court for the District of Maine, alleging that the Bank, Bancorp, and various officers violated various state statutes and state and federal constitutional provisions in connection with the conversion transaction. The complaint rested on the theory that those persons who happened to be depositors of the mutual bank at the time of its conversion were entitled to a distribution of the net worth the Bank had accumulated during its previous century of operation. Petitioners sought compensatory damages of $150 million and punitive damages of $50 million. Early in 1991, the Bank failed. After Maine's Superintendent of the Banking Bureau appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the Bank, the FDIC in that capacity was substituted for the Bank as a party to this case. Shortly after the FDIC entered the case, the district court certified to the Supreme Judicial Court of Maine certain questions of Maine law, including the following: (a) whether the state administrative process and petitioners' failure to challenge the conversion in that process barred petitioners' state-law claims in this case; and (b) whether Maine law granted depositors in a mutual savings institution an enforceable right to distribution of the surplus of such an institution when it converts to stock form if the charter does not specifically grant such a right. See Pet. App. 5a & n.1, 14a-16a.[3]

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[3] Because Bancorp entered bankruptcy in 1992, the proceedings against Bancorp were stayed. See Pet. App. 6a n.1. Bancorp accordingly is not a party to the case before the Court.

3. The Supreme Judicial Court of Maine issued an opinion responding to the questions in August of 1992. 614 A.2d 56.[4] The state court first stated that petitioners' common-law claims for monetary relief related to the conversion were barred because "the statutory and administrative scheme governing the conversion of a mutual savings bank to stock form has effectively displaced private rights of action relating to the conversion process." *Id.* at 62.[5]

The state court also concluded that Maine law does not entitle petitioners to a distribution of the Bank's net worth in connection with its conversion to stock form. 614 A.2d at 67. The court explained that "nothing in the language of the conversion statute" supported petitioners' claim to such an entitlement, and noted that the report of a study committee on which the statute was based expressly addressed—and rejected—a scheme under which depositors would have been entitled to such a distribution. *Id.* at 64-65. The court also rejected petitioners' reliance on provisions incorporated by reference in the 1859 charter of the Bank, which stated that "the net income of profit * * * shall be * * * applied and divided among the persons making * * * deposits." *Id.* at 65. The court explained that under Maine law the rights of depositors set forth in any charter for a mutual savings

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[4] The Maine court's opinion is not included in the appendix to the petition. The district court's opinion quotes the portion of the Maine court's opinion answering the questions at Pet. App. 16a-17a.

[5] The court stated that petitioners had an opportunity to seek judicial review under that scheme, and that "the failure to seek judicial review * * * serve[d] to bar [their] common law claims." 614 A.2d at 62.

institution are subject to applicable statutes. See *ibid.* (quoting Maine Rev. Stat. Ann. tit. 9-B, § 511(1) (West 1980)) ("The * * * duties and restrictions * * * imposed upon any savings bank * * * in its charter * * * are so far abridged, enlarged or modified * * * that every such charter * * * shall conform to this Title.").[6] Because a 1923 statute eliminated any entitlement for distributions to depositors during the solvency of the Bank, the charter could not provide such an entitlement. *Id.* at 66. The court explained that the only interest of depositors in the net worth of the institution was "a mere contingency and cannot be realized unless the bank liquidates while solvent; an unlikely event." *Id.* at 67. That contingency adequately was protected by the liquidation account for which the conversion provided. *Ibid.*

4. After receiving the answers to the certified questions from the state court, the district court granted summary judgment against petitioners. Pet. App. 5a-34a. Accepting the state court's conclusion that petitioners as a matter of state law had no property interest in a distribution of surplus at the time of the conversion, the district court ruled that petitioners had no property interest subject to protection under the Takings Clause. *Id.* at 19a-20a. Alternatively, the court rejected petitioners' takings claim because the conversion "had no appreciable economic impact on [petitioners]," because petitioners "had exactly the same right after the conversion" "to their funds deposited on account and the interest

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[6] The court noted that a similar law enacted in 1831 had been in effect at the time the Bank was created in 1859. 614 A.2d at 66.

accrued on those funds" as they had before the conversion. *Id.* at 21a. The court also rejected petitioners' claim for denial of procedural due process, relying on its conclusion that petitioners did not lose a cognizable property interest. *Id.* at 32a.

5. The court of appeals affirmed. Pet. App. 1a-4a. The court noted that petitioners' claims of a taking and violation of procedural due process could not succeed "[a]bsent a state property right," and thus rejected those claims based on the state court's conclusion that petitioners had not lost any property right. *Id.* at 2a. The court of appeals also pointed out that even if petitioners could have established a cognizable property interest in the liquidation account of the new institution, petitioners' claim of a taking still would fail because petitioners were "singularly unable" to show any tangible financial harm. *Id.* at 3a. The court also explained that petitioners' procedural due process claims were meritless because "it is a matter of record that [petitioners] had notice of the proposed conversion and an opportunity to respond." *Ibid.*

ARGUMENT

1. Petitioners first argue (Pet. 12-19) that the court of appeals erred in concluding that the conversion did not deprive them of an interest in property protected by the Fourteenth Amendment. Petitioners' argument is meritless.

As the Court explained in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the property interests protected by the Fourteenth Amendment "are not created by the Constitution," but rather "by existing rules or understandings that stem from an independent source

such as state law." *Id.* at 577. The only plausible basis for the property interest on which petitioners rely is Maine law regarding the rights of depositors to distributions from a mutual savings institution. But on that point, the final authority—the Supreme Judicial Court of Maine—has held definitively that the applicable statutes and charter provisions did not give petitioners any entitlement to such a distribution. Under Maine law, which is not unusual in this regard,[7] the only property interest depositors have is in the funds they have deposited, together with interest on those funds. The posited "right" to a portion of the institution's surplus is "a mere contingency and cannot be realized unless the bank liquidates while solvent," which the court properly characterized as "an unlikely event." 614 A.2d at 67; see *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955) (characterizing "the unlikely event of a solvent liquidation" of a mutual savings institution as "a possibility that hardly rises to the level of an expectancy").[8] Hence, although petitioners may have "had an abstract concern" in receiving the distributions they seek, they "did not have a *property*

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[7] See, *e.g.*, *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955) (explaining the limited nature of a depositor's equity interest in a mutual institution chartered under federal law); *Ordower* v. *Office of Thrift Supervision*, 999 F.2d 1183, 1187 (7th Cir. 1993); *York* v. *FHLBB*, 624 F.2d 495, 499-500 (4th Cir.), cert. denied, 449 U.S. 1043 (1980); *In re Corporators of Portsmouth Savings Bank*, 525 A.2d 671, 695 (N.H. 1987) (Souter, J., dissenting) (it "foster[s] confusion" to speak of depositors' ownership of a mutual financial institution).

[8] In this case, notwithstanding the infusion of capital provided by the conversion, the Bank failed in 1991.

interest" cognizable under the Constitution, *Roth*, 408 U.S. at 578.[9]

Contrary to petitioners' suggestion (Pet. 15), this is not a case where the State has "re-define[d]" an interest "by incorporating the procedures that were used in taking away the interest." As the state court held, petitioners never had any entitlement to a distribution of funds in connection with the conversion of the Bank to stock form. 614 A.2d at 63-67. Accordingly, the procedures for conversion did not deprive petitioners of any such entitlement, and thus did not offend the Due Process or Takings Clause.

2. Petitioners also contend (Pet. 19-23) that the procedures under which the conversion took place violated the Due Process Clause because they did not provide petitioners adequate notice. That claim, however, rests on the premise that the conversion deprived petitioners of a property interest cognizable under the Due Process Clause. For the reasons summarized above, the lower courts correctly concluded that petitioners were not deprived of such a property interest. In any event, the notice sent to petitioners fully satisfied the Due Process Clause. As the district court explained, the conversion was approved at a meeting of depositors that was held after the Bank sent and petitioners actually received a packet of materials that "included an accurate description of the conversion and its effects, informed them of the Superintendent's conditional approval of

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[9] Other courts have reached the same conclusion with respect to federally chartered mutual financial institutions. See *Ordower*, 999 F.2d at 1187 (conversion does not deprive depositors of a property interest); *York*, 624 F.2d at 499-500 (same).

the conversion plan, and recited the time period for judicial review of the Superintendent's order." Pet. App. 33a.

3. Finally, petitioners argue (Pet. 23-24) that the conversion deprived them of a "substantive due process right to be free from uncompensated takings and from arbitrary and capricious decisions affecting their property." Pet. 23. Like petitioners' other claims, that claim by its terms rests on the mistaken premise that the conversion deprived petitioners of a cognizable property interest. In any event, petitioners offer no support for their conclusory assertion that it was arbitrary and capricious for the Maine legislature to provide for conversions of savings institutions from mutual form to stock form without a distribution to depositors, or for the Superintendent to approve the conversion in this particular case. The opinion of the Supreme Judicial Court of Maine explains in considerable detail the reasons why the system applied in this case reflects fair consideration of the interests of depositors. 614 A.2d at 66-67. Petitioners' contrary view does not establish a significant constitutional claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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